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# EXTRADITION.

SINCE the termination, some six years ago, of the correspondence between Mr. Fish and Lord Derby on the subject of the extradition of Winslow, the questions left unsettled by them have attracted little general attention. It is not generally understood, however, that they have been transferred, in this country, at least, from the diplomatic to the legal forum, and that a new light has been thrown upon them by one or two judicial decisions of the highest importance.

Our agreement with England on the subject of extradition is an extremely brief document, contained in Article 10 of the Ashburton Treaty of 1842, as follows:

"It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been there committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

The difficulty which this treaty has produced has arisen in part from the extremely meager list of crimes which it covers.

As an illustration of this, and of the unsatisfactory condition of the relations between the two countries, we may refer to the accounts given in the newspapers last winter of the "Miller Extradition Case." Whether the facts are given with entire accuracy, we do not know; but they might all be true, and, as given, they illustrate the matter in a striking way.

In the early part of 1881, it is said, three men broke into a farm-house not far from Pittsburg, in the State of Pennsylvania, attacked the inmates, and committed a robbery. A large amount of booty was carried off, and one of the burglars, Miller by name, described as a notorious and skillful criminal, was captured. He was tried, convicted, and sentenced to the Western Penitentiary for eight years. After serving nearly two years he escaped, but was traced to Toronto, and steps were taken to secure his extradition. Eminent counsel were retained, and they argued a motion before the Canadian Courts that Miller should be surrendered to serve out his unexpired term. To this it was replied that the crime of burglary was not covered by the extradition treaty between the United States and Great Britain. To meet this difficulty, recourse was had to the assault committed by Miller in the course of the burglary. Assault with intent to commit murder is a crime for which, under the treaty, the surrender of a criminal may be demanded. Miller had never been indicted for this assault, and the charge was merely made for the purpose of getting him back to serve out his term of imprisonment. The Canadian authorities finally surrendered him, he was taken back to the penitentiary, and there he is to this day. No proceedings were taken to punish him for the crime for which he was extradited, and after some months the matter was brought up in the Canadian Parliament, and the United States charged with a violation of good faith in the matter, on the ground that Miller is not punished for the offense for which he was surrendered, but is undergoing punishment for an offense for which he was not extradited.

The questions raised in the correspondence with regard to the extradition of Winslow are these: Can a fugitive from justice, expressly surrendered on a charge of one crime, be tried for another and a totally different crime? If not, how is such a violation of the treaty to be prevented? Can the courts before which the fugitive is brought release him? And if not, how can there be any redress? Besides this, another question arose, as

to the effect of what is known as the English Extradition Act of 1870, which provides that fugitives shall not be surrendered at all by England unless it appears that the country to which they are surrendered has provided by law, or by arrangement, that he shall be tried only for the offense for which he is surrendered.

Without going anew into the merits of the diplomatic controversy on these points as conducted by Mr. Fish and Lord Derby, we wish to direct the reader's attention to the two latest judicial discussions of the whole subject by our own judges, the first of them by the Court of Appeals of Kentucky, in 1878; the second, by Judge Hoffman, in the United States District Court in California, last November,—both carefully considered decisions by courts of high repute. The Kentucky decision being substantially the same as that of Judge Hoffman, we need refer in detail only to his opinion, which is the more important, as it was rendered by a court of the United States, and is so recent.*

Watts, the prisoner arraigned before Judge Hoffman, was called upon to plead to three indictments. Instead of pleading to the merits, he interposed a plea to the jurisdiction, to the effect that he had been extradited from Great Britain; that the offenses charged in the requisition, and on which he had been surrendered, were other and different offenses from those alleged in the indictments, and that these were not offenses included in the treaty with Great Britain at all. To this plea the United States demurred, thus raising the question: First, What is the true construction of the tenth article of the Treaty of 1842 with Great Britain? Second, How far can or must the courts give it effect?

The answer of the court to these questions is briefly as follows: Whatever speculative views may be taken by theoretical writers as to the duty of States to surrender fugitives in the absence of treaty, with us extradition has long been a matter solely of treaty regulation. By our constitution an extradition treaty, like any other, is part of the "supreme law of the land," and, as such, binding upon all judges, and if it contains expressly or by necessary implication limitations and restrictions, these cannot be overriden by the courts. Now, proceeding to the construction of the Treaty of 1842, there is a common consensus of jurists with regard to treaties of extradition in general, that the person surrendered cannot be prosecuted or condemned ex-

* U. S. *v.* Watts, 14 Fed. Rep. 130; Com. *v.* Hawes, 13 Ken. 697.

cept for the crime in respect to which his extradition has been obtained. As to the treaty itself, it enumerates seven crimes for which the surrender of fugitives may be demanded. This enumeration is exclusive, and no one pretends that the fugitive can be demanded for any but the enumerated crimes. Not only this, but the language of Mr. Tyler in sending the treaty to Congress shows that "in this careful and specific enumeration of crimes the object has been to exclude all political offenses." But if, notwithstanding this, a fugitive could be extradited for a treaty crime, and then tried for a totally different offense, it is obvious that this safeguard would be entirely gone; he might be tried for treason just as well as for burglary. The surrendering government is made by the treaty the sole judge, not only as to the adequacy of the proofs submitted, but of the question whether the facts proved constitute an offense under its laws, and especially whether under those laws the offense is political in character. This right would be entirely destroyed if a fugitive could be tried for a totally different offense from that for which he was given up to be tried. The legislation of both countries confirms these views. The act of Parliament of 1843 directs that the fugitive shall be surrendered "to be tried for the crime of which such person shall be so accused," and the language of our act of 1848 is identically the same.

There is no doubt that some of the earlier decisions, in which this question has been considered, took a different view. In the case of Adriance *v.* Lagrave,* the defendant, after being extradited for a treaty crime, was arrested on civil process. The Supreme Court of New York discharged him, but the Court of Appeals reversed the judgment, declaring that the courts could not interfere in such a case. The point, however, is widely different from that under discussion in the Watts case, and the decision can hardly be regarded as an authority with respect to it.

The case of Caldwell,† decided in 1871 by Judge Benedict in the Southern District of New York, is undoubtedly in conflict with the California case, as well as the subsequent case of Lawrence, decided by the same judge, on the authority of the earlier decision. Caldwell was indicted for bribing an officer of the United States. He pleaded that he was brought into the jurisdiction of the court on a charge of forgery under an extradition treaty. The Government demurred to the plea, and the court

* 1 Hun, 689; 59 N. Y., 110. † 8 Bl., 131.

held that the prisoner could not avail himself of the defense, chiefly on the ground that "to hold otherwise" would "permit a person accused of crime to put the Government on trial for its dealings with a foreign power." It is hard to see how this meets the difficulty of jurisdiction. The bearing of the provisions of the treaty on the question do not seem to have been considered. The question of the right of the prisoner to raise the objection is disposed of by Judge Hoffman, in the following conclusive way:

"It remains to be determined whether the immunity from prosecution for crimes other than that for which the fugitive has been surrendered can be enforced by the Court, or only by the intervention of the political hand of the Government. This point has already been incidentally discussed. If I am right in supposing with the Court of Appeals of Kentucky, that the treaty, by necessary implication, prohibits the trial of the offender for any offense but that for which he has been extradited, the question is answered. The treaty is 'the supreme law of the land,' and as binding on the Courts as a statutory enactment. If it contained an express prohibition the Court would, beyond doubt, be deprived of its jurisdiction. If, by a just and reasonable interpretation the prohibition must be implied, the same result follows. It may be added that, assuming that the receiving power has no right to try the fugitive except for the offense for which he has been surrendered, the immunity so guaranteed is a right of the prisoner, and can be far more surely and conveniently asserted before the Courts than by diplomatic intervention. The wealthy and influential criminal might generally be able to secure the interposition of the surrendering government for his protection. But the poor and obscure offender might have no means of drawing the attention of that government to his case. It would be inconvenient, if not impossible, for the ambassador of the surrendering power to keep his eye on every case of an extradited fugitive with a view of interposing in case he should be put to trial for any other crime than that for which he was surrendered. If the protection of the fugitive be left solely to the political or executive power, the attempt to afford it would, in the United States, be attended by peculiar difficulties. In cases where the extradition has been obtained for an offense against the laws of the United States, the President could easily interfere, by directing the District Attorney to abandon the prosecution. But when the criminal has been surrendered for an offense against the laws of a State (as most frequently happens), neither he nor the Governor of the State has any such power. The latter may pardon, but he cannot control the District Attorney or the Court. If, therefore, the immunity of the fugitive cannot be enforced by the Courts, it can, in the United States, be effectually secured only by an amendment to the treaty or by an act of Congress."

It is obvious that this judicial view of the matter disposes of the chief unsettled questions with regard to extradition, so far as this country is concerned. Of course, other judges may

reach different conclusions; but it seems fair to say that the weight of judicial authority is now in favor of the position that a fugitive from justice, expressly surrendered for one crime, cannot be tried for another and totally different crime, and that the prisoner may have redress, as in any other case where the Court has no jurisdiction over him.

With regard to the English extradition act of 1870, that statute would in a great measure lose its importance if the judicial view above stated were generally acted upon. At the same time, our objection to the English extradition act of 1870 as an attempt by means of municipal regulations to impose a condition upon the surrender of criminals not to be found in the treaty, is perfectly valid. The international law of extradition is to be found in the treaty, and nowhere else. If we violate it, the remedy is not by act of Parliament, which cannot alter or affect treaty obligations. Our Government, it seems to us, was perfectly right in refusing to give the pledge required by the English extradition act, simply because the treaty requires no pledge. We have always maintained that an international obligation cannot be enlarged or diminished by municipal legislation; and the point was expressly raised and debated in the Alabama controversy, when the English Government maintained that its obligation as a neutral was to be found in its foreign enlistment act, while we insisted that it was independent of that or any act of Parliament, and rested upon the law of nations. In the same way the international obligations with regard to the extradition of criminals are to be found in the Ashburton Treaty and nowhere else, and we can never for a moment admit that a subsequent act of Parliament can impose restrictions not to be found in the treaty.

But, meantime, what possible interest has either country in keeping alive the dispute? It is not apparent why there should be any further trouble between England and the United States on the subject. The criminal law of both countries is substantially the same, and their interest in the suppression of crime identical. England can desire nothing more seriously than not to be used as an asylum for the malefactors of this country, and it cannot possibly be for our interest to harbor or protect English criminals here. Owing to the community of language, laws, and institutions, there are no two countries in the world between which the extradition of criminals ought to be more certain and

easy. There are only two cases in which there is any room for making an exception to this rule: that of offenses which the two countries regard and punish in a different way, or with a different degree of severity, and political offenses. Crimes against the revenue are in the United States punished with great severity, and, owing to the international difference of policy on this subject, we can hardly expect Great Britain to be very zealous about sending home criminals who have violated our customs laws. With regard to political offenses, there is no room for any difference of opinion or dispute. Neither nation has ever tolerated the idea of the surrender of political refugees for trial in their own country. This is all that is generally meant by the "right of asylum."

Notwithstanding all this, our treaty with England, which has been in force for forty years, covers only seven specified crimes: murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged paper. If we review the general progress of our extradition policy as exhibited in our treaties with other powers, we shall see that there has been a steady tendency to enlarge the list, and also to provide against all possible trouble such as has arisen with England. From the year 1842 to the present time, the United States has been continually engaged in making extradition treaties with foreign powers, and in each new treaty new crimes have been provided for. In 1843, in the treaty with France, rape was added, and in an additional article adopted in 1845, burglary; in 1858, we agreed with the same country to extend the provisions of the treaty to counterfeiting, and circulating counterfeit coin, and embezzlement by employees or servants. The treaty of 1850 with the Swiss Confederation covers "intimidation or forcible entry of an inhabited house," and embezzlement by public officers. By the treaty of 1861 with Mexico, larceny of goods to the value of twenty-five dollars was added. This process has continued down to the present day, the policy of Government in extradition negotiations being to cover the common dangerous offenses against life and property. Of course, the addition of new offenses is made piecemeal, as each new treaty comes up for negotiation, but there is no reason to believe that if we were now making a convention with England it would not embrace at least as many crimes as that made with Spain in 1877, in which fourteen different classes of offenses, with many subdivisions, are provided for.

But, besides a great increase in the list of extraditable offenses, our recent treaties show that it is the general policy of our Government to exclude by express provision from the operations of the treaty all offenses of a political character. The third article of the treaty with Spain provides that "this convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered by or to either of the contracting parties in virtue of this convention shall be tried or punished for any political crime or offense, nor for any act connected therewith, committed previously to the extradition." Similar provisions are to be found in our treaty with Turkey, made in 1874; with Belgium in the same year; with Ecuador in 1872; with Orange Free State, made in 1871; with Peru, made in 1870; with Nicaragua, made in 1870; with San Salvador, in the same year; with Italy, made in 1868; with the Dominican Republic, made in 1867; with Hayti, made in 1864; with Mexico, made in 1861; with Venezuela, made in 1860; with Sweden and Norway in the same year; with Baden in 1857; with Austria in 1856; and even in a treaty as old as that made with France in 1843.

These facts show, if any one were disposed to doubt it, that our extradition policy, as exhibited in our treaties with foreign powers, steadily tends in the direction of an enlargement of the list of extraditable crimes, and an express exclusion of political offenses. Precisely the same thing is true of the point on which all our difficulties with England as to extradition have hitherto turned—the question whether a criminal surrendered for a crime specified in a treaty of extradition can be tried for another and a totally different crime. If we look into our existing treaties, we shall see at a glance what is the present policy of the country with regard to this when the matter has been actually provided for by negotiation. The subject seems first to have attracted attention in the course of the negotiations with Italy, and the treaty of 1868 with that country provides that "the person or persons delivered up for the crimes enumerated in the preceding article shall, in no case, be tried for any ordinary crime committed previously to that for which his or their surrender is asked." This provision seems to prevent the trial of the criminal for any crime except the ones enumerated in the article. A similar provision was inserted in the treaty with San Salvador of 1870, and with Nicaragua of the same year.

The matter is more explicitly provided for in the treaty with Ecuador of 1872, which provides that extradited criminals "shall not be prosecuted for any crime committed previously to that for which his or their extradition may be asked." The treaty with Belgium of 1874 contains a similar provision; but the most distinct and explicit provision to be found is that contained in the Spanish treaty already referred to, made in 1877: "No person shall be tried for any crime or offense other than that for which he was surrendered, unless such crime be one of those enumerated in Article II.," *i. e.*, a treaty crime.

All these facts point in one direction, that there is nothing in our general extradition policy hostile to enlarging the meager list of offenses contained in the Ashburton treaty; nor to providing by treaty against trial for a different offense from that for which the surrender is made; nor against an express exclusion of political offenses. The Winslow correspondence is now deprived of most of its importance by such judicial decisions as that of the Kentucky Court of Appeals and Judge Hoffman. What is needed is a new treaty which will dispose of the matter in the same way that we have disposed of it with a dozen other foreign countries.

A. G. SEDGWICK.